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IN THE

Supreme Court of the United States

October Term, 1962

No. 525

WILLIAM H. LOEHDE AND JESSIE CAROLYN LOEHDE, HIS WIFE,

Petitioners,

vs.

WISCONSIN RIVER POWER COMPANY, A WISCONSIN CORPORATION, AND WALTER BUCHANAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions involved	3
Statement of case	3
Reasons for granting the writ, and argument	10
Conclusion	19
Appendix A -- Opinion of C. C. A. (7th Cir.) dated April 20, 1960, 277 F. 2d 656	20
Appendix B -- Opinion of C. C. A. (7th Cir.) dated June 12, 1962, 304 F. 2d 433	28
Appendix C -- Exhibit 22 -- Petenwell Dam Area and Loehde Land *Before* Construction of the Dam	34
Appendix D -- Exhibit 23 -- Petenwell Dam and Loehde Land (Lake) *After* Construction Completed	35
Appendix E -- Exhibits 29 and 30 -- Petenwell Dam Area, With Overlay Data by Power Company Engineer	36

CITATIONS

CASES

Carter Oil Co. v. McQuigg, 112 F. 2d 275 (C.C.A. 7th)	15
Crosby v. Smith, 19 Wis. 472	11
Elkhorn-Hazard Coal Co. v. Kentucky River Coal Corp., 20 F. 2d 67, 71	16
Findlay v. Knickerbocker Ice Co., 104 Wis. 375, 80 N. W. 436	16

Page

Pine River Logging & Imp. Co. v. U. S., 186 U. S. 279, 46 L. Ed. 1164, 1171 ---- 16

Rock v. Belmar Construction Co., 252 N. Y. S. 463, 464-465 ---- 15, 16

Topzant v. Kosche, 242 Wis. 585, 588-590, 9 N. W. (2d) 136 ---- 15, 16

Traeger v. Sperberg, 256 Wis. 330, 333, 41 N. W. (2d) 214 ---- 16

U. S. vs. U. S. Gypsum Co., 333 U. S. 364, 92 L. Ed. 746 ---- 15

U. S. v. Wyoming, 331 U. S. 440, 458, 91 L. Ed. 1590, 1600 ---- 15, 16

Warren, et al v. Putnam, et al, 68 Wis. 481, 32 N. W. 533, 536, 538 ---- 16

Welton v. 40 East Oak St. Bldg. Corp., 70 F. 2d 377 (Cert. den. 293 U. S. 590) ---- 11

STATUTES

28 U. S. C. § 1254 (1) ---- 2

Wisconsin Statutes, Section 281.02 ---- 13

TEXTS

60 A. L. R. (2d) 310, et seq. ---- 11

Callaghan's, Wisconsin Pleading & Practice, Vol. 8, Sec. 71.08 ---- 11

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on June 12, 1962.

OPINIONS BELOW

Following the first trial, the District Court (W. D. Wis.) did not file a formal opinion. Its findings of fact and con-

clusions of law are set forth at pp. 6-9 in the Appendix[1] used in the Court of Appeals and filed herein. The opinion of the Court of Appeals on the first appeal is reported in 277 F. 2d 656, and appended hereto in Appendix A, *infra*, pp. 20-27.

Following the second trial, the District Court filed an opinion, findings of fact and conclusions of law, reproduced at pp. 119-129 of the Appendix. The opinion of the Court of Appeals on the second appeal is reported in 304 F. 2d 433, and appended hereto in Appendix B, *infra*, pp. 28-33.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1962. A petition for rehearing filed on June 26, 1962, was denied on July 27, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioners are entitled to an injunction enjoining respondent Power Company from flowing water on and across petitioners' land, making a lake out of it, where it has been adjudicated that: a) petitioners never agreed to convey to the Power Company, b) petitioners have sole title to the land, c) petitioners are entitled to return of possession, d) petitioners never gave the Power Company any license to flood their land and never acquiesced therein, and e) the Power Company has no power of condemnation?

2. Whether the Court below erred in failing to award dam-

1. Unless otherwise specially noted, references to "Appendix" or "Ap." refer to the Appendix printed and used in the 7th C.C.A. on the 2nd appeal to the C.C.A. in this case. Petitioners have also filed with the U.S. Supreme Court a copy of the printed appendix used on the 1st appeal.

ages to petitioners for the trespass and conversion based upon the value to the Power Company of the 320,000 cubic yards of sand taken from petitioners' land, at a) 15¢ per cubic yard in place on Loehde's land if the trespass was in good faith, *or* b) 45¢ per cubic yard as moved to and used in the construction of the Power Company's earth dam if the trespass was willful; and whether the Court below erred in entering judgment for damages of only $260 based upon an agricultural value of the land so converted, rather than the value of the sand to the Power Company, including the profit realized by it from its own wrongful acts?

CONSTITUTIONAL PROVISION INVOLVED

The fifth amendment to the United States Constitution provides: "No person shall . . . be deprived of life, liberty or property without due process of law . . . "

STATEMENT OF CASE

This is a diversity action brought in the District Court (W. D. Wis.) to recover possession of real estate, for an injunction, and for damages in the amount of $160,000.00.

In 1948 defendant, Wisconsin River Power Company, constructed its Petenwell Dam across the Wisconsin River approximately 500 feet north of the plaintiffs' forty acre tract lying on the east side of the river. Except for the concrete gate section, the nine miles of dam and dikes containing the lake created by the project were constructed entirely of sand materials excavated from borrow pits on lands owned by the Power Company or by petitioner Loehde.

Construction of the dam was commenced in April, 1948.

The river closure, which took place immediately north of the Loehde forty, was completed in December of 1948. Loehde had owned his land for many years. In March of 1948, for the first time, the Power Company telephoned Loehde, who lived in Chicago, in an attempt to purchase his land. The defendant Power Company had no power of eminent domain.

It was determined by the Court of Appeals upon the first appeal, in its decision dated April 20, 1960, 277 F. 2d 656, that no contract or agreement was reached between Loehde and the Power Company, stating:

> "It is apparent that the correspondence above detailed did not establish a contract on the part of the plaintiffs to convey the tract they owned to defendant . . . Nor did the escrow deposit of the April 10, 1948 deed executed by plaintiffs effect a conveyance of title to defendant. The consideration therefor was never 'arranged,' or agreed upon; the transaction never consummated. In addition the defendant affirmatively rejected acceptance of a conveyance on the terms and conditions contained in that deed. Although Loehde's correspondence indicated a willingness to deal, no deal was ever agreed upon or concluded.
>
> "We find no support in the present record for the findings, conclusion and judgment of the District Court vesting title to the property in defendant. The case must be reversed and remanded for a new trial . . . We do direct that the District Court permit such amendments to the pleadings as will serve to properly reform the issues and that it permit plaintiffs to introduce evidence as to the value of the sand excavated." (First C. C. A. Decision reproduced at Appendix A, *infra,* pp. 20-27).

Following the second trial, the District Court found that title at all times material to the action has been and still is in Loehde and that Loehde is entitled to a return of possession

of his land. No issue as to Loehde's title and ownership was raised on the appeal below.

In disregard of Loehde's ownership and rights, and having full knowledge of its lack of permission to do so, in April of 1948 the Power Company moved upon Loehde's land and directed its contractor to excavate at least 320,000 cubic yards of sand material from Loehde's land and to transport it to and incorporate it in the earth dam immediately north of Loehde's property. Loehde had no knowledge of these acts until the following fall. (Ap. 51-54)

Loehde's entire correspondence was with Mr. C. C. Fuller, a banker of Necedah, Wisconsin, who was also an officer of the Power Company and a close personal friend of Mr. Loehde's. In Loehde's letter to Fuller of March 13, 1948 (Exh. 7 -- Ap. 105-106), the sole basis for the decision of the Court below, he stated:

> "Should an emergency arise relative to use, the company is at liberty to act on necessary construction work and we will agree on settlement later . . . ."

And

> "Mr. Thiele expressed some concern about emergency matters of minor importance relative to the forty acres in respect to which I assured him he could move and you would be in charge and protect my interest."

Thereafter, at Fuller's request, Loehde forwarded his abstract to Fuller for examination. Fuller, on April 17, 1948 sent Loehde a proposed form of warranty deed for an absolute conveyance to the Power Company, suggesting that Loehde sign it and return it and that they would then "work out some deal along the lines that you wrote him, that will be mutually satisfactory." Loehde did not sign the warranty deed, but on April 12, 1948, sent Fuller a so-called "seepage deed" to be held in escrow, and in his letter Loehde stated "The consideration

therefor shall be arranged between the company and me within the next ninety days upon Mr. Fuller's recovery." (Ap. 106-108) The so-called "seepage deed" drafted by Loehde contained exceptions and limitations which caused Mr. Brazeau, defendant Power Company's attorney, to return it to Fuller on April 21, 1948 with the comment that it was "so complex and obscure that we are unable to get at the meaning of the same." Brazeau sent to Fuller a new form of absolute deed for execution by Loehde. It was not sent to Loehde until October, after the sand had been taken. Loehde refused to sign it.

After rejecting the "seepage deed," neither the Power Company, its attorney, Brazeau, nor Fuller wrote to Loehde or telephoned him nor made any other effort to work out a deal to acquire the land. The Power Company entered upon the property and excavated and removed the material in question and flooded Loehde's land.

Loehde testified that in his telephone conversation with Thiele prior to writing his letter to Fuller of March 13, 1948, the "emergency . . . construction work . . . of minor importance" referred to was bringing equipment and electric lines across Loehde's land, construction of temporary buildings usually erected below dam projects and temporary storage of vehicles and supplies there. (Ap. 64-65) Loehde testified categorically and without dispute that neither Thiele, Fuller nor anyone else at any time had ever asked him for permission to take any material from his land or to flood his lands, and that no one on behalf of the Power Company had ever even mentioned any intention of taking such materials from his land or flooding his land. (Ap. 51-54)

When the President of the Power Company, Thiele, decided to go ahead and take Loehde's land even though no agreement has been reached, Fuller, who Loehde wrote was to "be in charge and protect my interest," and who realized the Company had no permission from Loehde to take his land, advised Thiele

"not to enter without seeing (Loehde) first." (Ap. 54) No evidence to contradict Mr. Loehde's testimony was presented during the first or the second trial. Fuller's letter to Loehde of October 11, 1948, corroborates it. (Exh. 15, Ap. 110)

When Loehde first found out what had happened in October, 1948 upon visiting his land, he immediately protested to Fuller personally and the latter stated that "he took no responsibility . . . that he had advised Thiele not to enter without seeing me (Loehde) first." (Ap. 54) On the first trial Loehde testified that Thiele, then President of the Power Company, admitted that that he had not talked to Loehde at any time about excavating or flooding Loehde's land, but went ahead anyway because he "couldn't wait"; that Brazeau (Attorney for Power Company) "had ordered the excavations" because "the damages would not exceed the value of the property." Loehde told Thiele that if he had called him when Fuller asked him to do so, Loehde would have settled on some basis. Thiele replied, "Time was running . . . I couldn't wait." (Trans. 1st trial, p. 189, Appendix on 1st Appeal to C. C. A. pp. 47-48). Thiele did not deny those admissions although he was a witness upon the first trial.

Following Loehde's return to Chicago, Fuller wrote Loehde on October 11, 1948, that "since you have been here and have been able to see what has happened to the land to which you have title" he was enclosing a broad form deed which he asked Loehde to execute and return "to be held, until further development." (Exh. 15, Ap. 110) Loehde refused to do so, and after settlement negotiations failed, instituted this action.

Counsel for defendants stated that they made no claim that Loehde ever condoned or acquiesed in the taking of materials from and the flooding of his land. (Ap. 52-53) No evidence of any permission or license to take material from Loehde's land or to flood that land was presented by defendants upon either trial other than Loehde's letter of March 13, 1948 (Exh. 7, Ap. 105) Admittedly, no consideration was ever paid or

agreed upon, either before or after such taking and flooding, either orally or in writing.

The Power Company has never claimed that there was any "emergency" to justify its trespass and conversion, and the Courts below found none. Loehde was as close as the telephone, and the dam took a year to build. In fact, the Power Company has always claimed that it had no need for Loehde's land and that it had no value to it. Then why did it take it? A look at the photographs at the end of this Petition readily reveals the reason -- proximity!

Prior to construction of the Petenwell Dam, the Loehde land had an average elevation six feet above the normal flow of the Wisconsin River. (Ap. 26, 28) Immediately after construction, only five acres of his forty acre piece remained above water. (Ap. 34) The balance has become a lake under the control and domination of the Power Company (See Exhs. 22 and 23, aerial photographs reproduced *infra* at pp. 34 & 35).

Because greater seepage and drainage through the earth dam and east dike was encountered than had been anticipated, (Ap. 80-81, 118) in 1950 additional material was hauled in to widen and bolster up the downstream toe of the dam and dikes, and two drainage ditches were constructed south of the east dike to collect the seepage and drainage. All of that water was channeled through the Loehde property to the Wisconsin River. (Ap. 80-81, 118) In 1951 the force of the water flowing across the Loehde land was so great that the Town Road giving access to the land was washed out. (Ap. 34, 36, 71, 87) By the time of the second trial (April 17-18, 1961) only three acres of Loehde's land remained above water. (Ap. 36).

In 1949 construction on the Castle Rock Dam of defendant Power Company, located approximately twelve miles south of the Petenwell Dam, was started. Work was completed by 1951. This resulted in forming a lake above Castle Rock and below Petenwell which further raised the average height of the

water on the Loehde land an additional two to four feet and flooded an additional two acres. (Ap. 29, 69-70, 73, 113-114). Water controlled by defendant Power Company has been continuously flowing and channeled across the Loehde land since construction of those dams. (Ap. 80-81. See Exhs. *infra*, pp. 34-36)

There is nothing in the record to show that it would be impossible, impractical, or harmful for the Power Company to be required to redirect the waters it controls so as to remove them from the Loehde land.

In the Complaint, as amended, Plaintiffs-Appellants have alleged: (1) That the value of the material unlawfuly converted and taken from the Loehde land was 50¢ per cubic yard to the Power Company as used by it in the earth dam, or a total value for the 320,000 cubic yards taken of $160,000; (2) That Loehde owned the land in question and was entitled to return of possession thereof; and (3) That an injunction should be entered enjoining the defendant Power Company from continuing to cause water to percolate through or to flow across or upon plaintiffs' land.

The *undisputed* and *only* testimony by any witness as to the value of the sand excavated from Mr. Loehde's premises was the testimony of Phil Kaiser, an earth moving and road building contractor called by the plaintiffs. He testified that the value of that material *in situ* and before removal in 1948 was 15¢ per cubic yard. (Ap. 40-43) *No witness was called by the defendants to contradict that undisputed testimony.*

The Power Company paid the contractor 30¢ per cubic yard for moving the sand taken from the Loehde land and placing it in the earth dam immediately to the north. (Ap. 24, 45, 50) Thus, the value of the material taken from Loehde's land as used and converted at and into the earth dam by the Power Company was 45¢ per cubic yard (15¢ plus 30¢).

Following the second trial, the Trial Judge found and Judg-

ment was entered adjudging: (1) That Loehde owned the land in question and was entitled to return of possession; (2) That the plaintiffs' damages consisted of the differences in the *agricultural value* of the land before and after the taking and flooding, only $260; and (3) That the defendant Power Company be enjoined from permitting percolating waters from the Petenwell Dam to flow across the plaintiffs' land *"to such an extent that it causes further erosion of said land."* The Power Company was *not* enjoined from continuing to flood Loehde's land. (Ap. 130) Plaintiffs appealed from the entire Judgment, excepting only that portion which adjudged the plaintiffs to be the owners of the land and entitled to return of possession of the land. On the second appeal, the judgment of the District Court was affirmed.

For the convenience of the Court and for a better understanding of the entire situation, Appellants have reproduced, in condensed form at the end of this Petition several of the large aerial photographs introduced in evidence upon the trial. We respectfully suggest that at this point the Court open up and view those photographs. The first photo shows the area, including Loehde's land, *before* construction of the dam. The other two photos show the area *after* construction. Loehde's land is now covered by water, except for three acres.

REASONS FOR GRANTING THE WRIT, AND ARGUMENT

1. Mandatory Injunction Required.

The failure of the Courts below to grant an injunction requiring the Power Company to remove its water from Loehde's land is contrary to the judgment entered of ownership in and right to a return of possession to Loehde, and is in conflict with the decisions of the Wisconsin Supreme Court, the decisions of the other States, and the Courts of Appeals.

Crosby v. Smith, 19 Wis. 472.

Callaghan's, Wisconsin Pleading & Practice, Vol 8, Sec. 71.08.

60 A. L. R. (2d) 310, et seq.

Welton v. 40 East Oak St. Bldg. Corp., 70 F. 2d 377 (Cert. den. 293 U. S. 590).

The Court of Appeals has, by affirmance, sanctioned such a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Fifth Amendment to the United States Constitution provides: "No person shall . . . be deprived of life, liberty, or property without due process of law . . ." By its decision, the Court below has allowed a private corporation to take and continue to hold and use petitioner's land without right, title or "due process of law." By its decision it has, in effect, granted to the Power Company not only the power of eminent domain, where none exists, but has failed to even give "just compensation" therefor.

It has been *adjudicated* in this case that 1) Loehde never agreed to convey, 2) he is the owner of the land, and 3) he is entitled to return of possession. It was *stipulated* that the Power Company had no right of eminent domain, and that Loehde did not acquiesce in or condone the taking of sand and the flooding of his land. (Ap. 23, 52-53). It is *undisputed* that Loehde never gave permission or a license to flood his land. The Power Company did not claim, nor did the District Court find any such license. The District Court stated that the license to remove sand, which it found based solely on Loehde's letter of March 13, 1948, and in disregard of the other undisputed testimony in the case, terminated when "the soil had been removed" in May of 1948. (Ap. 127 – Finding No. 11.)

There was no flooding of Loehde's land until the river closure of the Petenwell Dam in December of 1948. (Ap. 88). *Subse-*

quently, the Power Company 1) dredged ditches to collect *all* the seepage and drainage from the east dike and earth dam and channel it across the Loehde land back into the Wisconsin River; 2) in 1950 carried away and destroyed the town road on Loehde's land by the tremendous quantity and force of its water; 3) in 1950 it completed the construction of the Castle Rock Dam, below the Petenwell Dam, and raised the level of the water on Loehde's land by an additional two to four feet and flooded another two acres; 4) in the ensuing fourteen years has kept *all* of Loehde's land under water controlled and directed by the Power Company, except for three acres which is gradually being eroded away.

The decision of the Court of Appeals does not take into consideration the additional burdens placed on the land by the Castle Rock Dam. The decision refers only to the Petenwell Dam and throughout it refers to "the dam." Castle Rock placed its extra burdens on the land in 1951 long after the Court said any license terminated. Even assuming a license to take the soil, which there was not, that license under no stretching of the law permitted the placing of the additional burdens on the land by defendant's Castle Rock Dam. The right to flood the two additional acres and to place two to four more feet of water on the land was given to the Power Company for absolutely no reason or justification by the broad sweeping decision of the Court.

The judgment below does *not* require the Power Company to remove its water. Yet it holds that Loehde owns the land and is entitled to return of possession. The Power Company is *only* ordered to stop flowing water "to such an extent that it causes further erosion to said land." The Power Company has done nothing to even comply with that order on the assumption, evidently, that only nominal damages will be awarded after the last three acres are flooded away.

This ruthless, brazen, and willful disregard of the property rights of others cannot be condoned. The Power Com-

pany took a calculated risk. So far it has gotten by with it. These two dams were constructed by defendant, a private corporation organized for profit, for one purpose and that is to make money for the corporation. It has no right to ask for leniency, a "balancing of equities," or "substantial justice." It has and wants to continue to profit by its own wrong. In another six years, it will have had adverse possession of Loehde's land for the required twenty year period. It is probable that the defendant Company will then have title through its own wrongful acts. Sec. 281.02 Wis. Stats.

The courts below erred in refusing to grant a broad injunction. This is particularly true since there is nothing in the record to show that it is impossible or impractical for defendant to remove the waters it controls and to direct the waters back into the normal Wisconsin River Channel in some alternative manner.

The Court of Appeals and the District Court have failed to consider the effect of this decision on settled property law and the due process provisions of the Constitution. We trust this Court will do so.

It is elemental that property rights in the United States are sacred. What land in America is safe if a large, private corporation, by ruthless power, can take a man's land for its own selfish purposes without right or title, profit by its own wrong, save thousands of dollars from conversion of the soil, and continue to occupy it with impunity? How can Loehde enjoy ownership and a return of possession when the Power Company's water continues to cover his land?

The decision of the Court of Appeals and the District Court is an anomoly on its face. It calls for an exercise of this Court's power of supervision, and the entry of a full injunction for removal of the water from Loehde's land. We even suggest that such need is so patent here as to require no further argument.

2. Decision Of Lower Courts Was Founded Upon The False Premise Of A License.

The District Court found (Finding 11) that the Power Company was a licensee in removing the soil. From this erroneous premise, the conclusions and judgment were also erroneous. Loehde in his letter of March 13, 1948 (Exh. 5, Ap. 105) wrote that the company was "at liberty to act on *necessary* construction work", but only if "an *emergency* should arise." He also referred to "*emergency matters* of minor importance."

In order for there to be a license, an emergency must be proved and the Power Company had the burden of proof. The Power Company made no effort to prove an emergency. In fact it argued that there was no emergency and it had no need for the Loehde land. The District Court found (Finding 17):

> "17. There was sufficient other soil in the general locale that defendant power company could have utilized in constructing the Petenwell Dam without disturbing plaintiff's land."

Since the court found that there was other soil the defendant could have used without disturbing the plaintiff's land, there simply was no emergency need for Loehde's land. Consequently there could be no license.

The Court of Appeals erroneously concluded that it was precluded by Rule 52(a) from disturbing Finding 11 on review and affirmed the decision based on the false premise that the defendant had a license to remove the soil. The Court of Appeals, in fact, was not precluded from changing that finding, since the finding was based in its entirety on documentary evidence and not on the testimony of witnesses. The Court of Appeals was, and this Court is, in just as good a position as the District Court to determine whether the letter of March 13, 1948 gave the defendant company a license to remove the soil.

There was no conflicting testimony on whether there was a

license. No testimony was required to explain any ambiguity. There simply were no witnesses on the point whose credibility had to be judged. In such a case, the reviewing court is not precluded from changing the District Court's finding. *U. S. v. U. S. Gypsum Co.*, 333 U. S. 364, 92 L. Ed. 746; *Carter Oil Co. v. McQuigg*, 112 F. (2d) 275.

The facts require a reversal of the obviously erroneous finding that there was a license to remove the soil. A finding that the defendant company had no such license will result in a fair and equitable judgment.

3. Petitioner Is Also Entitled To Substantial Damages, With Interest From May Of 1948, And Attorney Fees.

The law will not permit a wrongdoer to profit by his own wrong. Therefore, one who willfully or in bad faith trespasses on the land of another and removes materials is liable to the owner for their full value to the wrongdoer at the place where the trespasser converted them to his use. An innocent trespasser who has acted in good faith may deduct from such value the expenses of extraction and moving and is liable only for the value in place before removal.

U.S. v. Wyoming, 331 U.S., 440, 458, 91 L. Ed. 1590, 1600.

Topzant v. Kosche, 242 Wis. 585, 588-590, 9 N.W. (2d) 136.

Rock v. Belmar Construction Co., 252 N. Y. S. 463, 464-465.

Good faith is something more than the trespasser's assertion of a colorable title. When the trespass and conversion are established, it is presumed to be willful, and the burden of pleading and proving good faith is on the defendant. If the trespasser has knowledge of all the facts as to title, he cannot be

innocent, his removal is willful, he is presumed to know the law and does not act in "good faith."

U.S. v. Wyoming, 331 U.S. 440, 458, 91 L. Ed. 1590, 1600.

Elkhorn-Hazard Coal Co. v. Kentucky River Coal Corp., 20 F. 2d 67, 71.

Warren, et al v. Putnam, et al, 68 Wis. 481, 32 N. W. 533, 536, 538.

That there may not be another purchaser for the removed soil, other than the defendant company, is immaterial. If defendant exceeded any permission granted, it is liable for the consequences of all excessive acts and for the full value to it of the material utilized by it.

Rock v. Belmar Construction Co., 252 N. Y. S. 463, 464-465.

Pine River Logging & Imp. Co. v. U.S., 186 U.S. 279, 46 L. Ed. 1164, 1171.

Elkhorn Hazard Coal Co. v. Kentucky River Coal Corp., 20 F. 2d 67.

The rule is well established in Wisconsin and throughout the United States that in an action for conversion, the plaintiff may recover the value of the property to the converter at the time of the conversion *plus interest* to the date of trial.

Traeger v. Sperberg, 256 Wis. 330, 333, 41 N.W. (2d) 214.

Topzant v. Kosche, 242 Wis. 585, 588-590, 9 N.W. 2d 136.

Findlay v. Knickerbocker Ice Co., 104 Wis. 375, 80 N.W. 436.

The undisputed testimony proves conclusively that the Power Company converted 320,000 cubic yards of sand from Loehde's land without permission, agreement or deed of conveyance. It

acted willfully and in bad faith. It was a trespasser and converter.

The Courts below completely overlooked the undisputed testimony of Loehde, not denied by any Power Company witness including its President, Thiele, who was a witness on the first trial. Loehde said no one ever asked for and he never gave or even discussed permission to take his sand and flood his land. His correspondence was solely with Fuller, who was "to be in charge and protect my (Loehde's) interest." Fuller realized that Loehde's letter of March 13, 1948, referring to "emergency . . . construction work . . . of minor importance," with negotiations still pending, did not authorize the destruction and flooding of the property.

Fuller told Thiele "not to enter without seeing (Loehde) first." When Loehde later asked Thiele why he had gone ahead without consulting him first, Thiele gave Loehde the same answer he gave Fuller: "Time was running . . . the damages would not exceed the value of the property . . . I couldn't wait." He just went ahead and took a calculated risk.

Loehde's letter did not give a license. The only "emergency" was the Power Company's desire to save construction costs by taking sand from Loehde's land which was located on the river bank 500 feet below the dam. It was a desirable, impervious type of sand. No material could be taken above the dam because that would cause underground seepage and weaken the dam. The Power Company did not own the land below Loehde's. The land it did own to the east was a slough and swamp which was not usable economically (Ap. 35, 37, 43, 78, 85, 97-99). In spite of its unlawful use of Loehde's sand, the Power Company still had to haul a large part of the sand for the earth dam from a site over a mile northeast of Loehde's property. (Ap. 26-28, 73, 91).

The length of haul of sand was the determining factor in the cost of constructing the dam, testified the Engineer who had been in charge of the work, and plaintiffs' expert, Kaiser. (Ap.

38, 46-50). Kaiser testified that because of its strategic location and the lack of other equally available sand, Loehde's sand was worth at least 15¢ per cubic yard in place on his land, and that the Power Company saved a minimum of 25¢ per cubic yard by using Loehde's sand rather than hauling it from the nearest alternative source. (Ap. 38-43). Thirty cents per cubic yard was paid by the Power Company to the contractor for excavating and moving Loehde's sand to and placing it in the earth dam.

Thus, the value of the 320,000 cubic yards of Loehde's sand (at 15¢ a yard) converted by respondent was $48,000.00 in place on Loehde's land. The cost of excavation and hauling (at 30¢ a yard) was $96,000.00. Therefore, the full value *to the Power Company* of the sand in place on the dam was $144,000.00.

The Power Company's land appraiser admitted on cross examination that his appraisal of $760 for the Loehde land was based entirely on its agricultural value. He admitted that he gave no consideration to its industrial value to the Power Company as a borrow site, its proximity to the dam and its use as a conduit for the seepage water. The Power Company never intended to use the land for grazing. It intended and did use and as a conduit for seepage waters. The letter of April 21, 1948 from Company attorney Brazeau to Fuller (Exh. 14) told the Company's secret plans for the land. It said, "Our people tell us that the property will be worthless when they have used it for filling and a sand pit."

The value of the land as a borrow site and the value of the soil taken, as a practical matter are one and the same thing. The value of the sand to the Power Company, or the value of the land to the Company as a borrow pit is $144,000.00. Judgment should have been for that amount, plus interest, since the Power Company was a willful trespasser in bad faith. The Courts below clearly erred in awarding damages of only $260.00.

Even if, as the District Court erroneously found, there was other land owned by the Power Company equally usable so that Loehde's soil had no value in place on his land, Loehde would still be entitled to judgment for $96,000.00, based on the cost of excavation of the soil and its use in the dam. Loehde should have judgment for at least that amount to prevent the Company from profiting by its own wrong. Even if it is found that the Company acted in good faith, which is unbelievable under the circumstances, it is still liable for damages in the sum of $48,000.00, the value of the sand in place on Loehde's land. The judgment should also include interest at Wisconsin's statutory rate of 5% per year from May 1, 1948 to date, and attorney fees.

The Judgment as entered for nominal damages, without interest, is so clearly unfair and erroneous as to call for an exercise of this Court's power of supervision. We even suggest that as to both an injunction and damages such need requires no further argument.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

October 10, 1962

Respectfully submitted,

RICHARD P. TINKHAM, JR.
Counsel for Petitioners

WILLARD C. MEIER
Of Counsel

APPENDIX A

7TH CIRCUIT COURT OF APPEALS DECISION, APRIL 20, 1960 – 277 F. (2d) 565 – No. 12761

Before HASTINGS, *Chief Judge*, DUFFY and CASTLE, *Circuit Judges*.

CASTLE, *Circuit Judge*. This diversity action was brought in the District Court by plaintiffs-appellants, William H. Loehde and Jessie Carolyn Loehde, husband and wife, to recover possession of real estate and for damages in the sum of $100,000.00. Defendants-appellees are Wisconsin River Power Company (hereinafter referred to as defendant) and Walter Buchanan, its lessee. Plaintiffs allege that defendant in connection with the construction of its Petenwell dam across the Wisconsin River unlawfully entered upon a forty acre tract of land owned by plaintiffs, excavated and removed approximately 400,000 cubic yards of soil and without right leased the premises to Buchanan for a term of twenty-five years. Defendant's answer, *inter alia*, admits the entry, excavation and leasing, but denies that plaintiffs were at the times mentioned the owners of and rightfully possessed of the property. Defendant alleges that on April 10, 1948 plaintiffs conveyed the tract to defendant with intention of giving defendant title thereto but placed the deed in escrow until the consideration was paid; that the consideration was a conveyance to plaintiffs of forty acres of defendant's property to be selected by plaintiffs; and that plaintiffs have failed and neglected to make such selection although defendant is still ready, willing and able to make such conveyance. Entry without consent of plaintiffs is denied and defendant alleges that pending selection by plaintiffs of the acreage to be conveyed them and its conveyance by defendant, the latter was to use said property as its needs required. Dismissal of plaintiffs' complaint on the merits was prayed. The court allowed a motion of defendant to amend the prayer of its answer to request that the court find the reasonable market value of the tract involved, and that plain-

tiffs be required to deliver a warranty deed upon payment of such amount. No formal amendment was filed.

The case was tried without a jury. It was stipulated that defendant does not have the right to exercise the power of eminent domain; that prior to April 10, 1948 the tract involved was in the ownership of plaintiffs; and that approximately 320,000 cubic yards were excavated therefrom by defendant.

The findings of fact made by the court included findings that Jessie Carolyn Loehde is a nominal party plaintiff; that prior to April 10, 1948, William H. Loehde was owner of the tract, all but thirty acres of which was under water; that prior to April 10, 1948 defendant contracted to purchase the lot from plaintiffs, the consideration to be a parcel of equal value owned by the defendant and located on the pond or lake created by backwaters of the dam; that the contract was evidenced in writing by correspondence; that about 300,000 cubic yards were excavated and the excavation was with consent of plaintiffs given prior to April 10, 1948; that prior to said date defendant was, in fact, the owner of said lands so contracted to be conveyed to it and entitled to a deed of same in fee simple subject only to paying plaintiffs the purchase price by such exchange of property or the cash market value of the tract, which was $760.00; and that after April 10, 1948 plaintiffs had no further claim or title to said lands and same were fully vested in defendant subject only to the payment to plaintiffs of $760.00, the fair market value of the tract prior to the excavation therefrom. The Court concluded and entered judgment that defendant is and was from April 10, 1948 the owner in fee simple of the tract, free and clear of all claim, right or demand of plaintiffs and that plaintiff, William H. Loehde, is entitled to have and recover of defendant $760.00, with costs.

Plaintiffs appealed. The main contested issues are (1) whether the District Court's finding and conclusion of ownership in defendant is supported by the evidence, (2) whether the Court

erred in excluding evidence as to the value of the soil or sand excavated and removed from the tract, and (3) whether the Court erred in limiting the recovery to plaintiff, William H. Loehde, to the exclusion of Jessie Carolyn Loehde.

The record establishes that ownership of the tract was in both William H. Loehde and Jessie Carolyn Loehde. The land was near Necedah, Adams County, Wisconsin, adjacent to, and about 500 feet below the Petenwell dam erected by defendant. The sand excavated was used in construction work incident to the erection of the dam.

We have carefully reviewed the record and considered the corrspondence relied upon as constituting a contract upon the part of plaintiffs to convey the tract they owned in exchange for forty acres of defendant's property to be selected by plaintiffs. C. C. Fuller, a Necedah banker, who as an officer and agent of defendant was acting for it in the acquisition of land in connection with the construction of the dam, wrote William H. Loehde under date of March 12, 1948 advising that:

> "The reason I am writing is at the request of Mr. Thiele who at the present moment is down at Sandersville, Georgia, and they seem quite anxious to go in and do some preliminary work on some of the river bottom land and he asks if you would be good enough to deposit your deed to your land with the abstract with us, with the understanding that the company will convey forty acres on the lake shore making their reservation for what they need for the operation and maintenance of their dam and electric power. They would convey at any time when we have definitely decided what is wanted or be willing to wait until water is stabilized and until you make a selection of a parcel of land with equal acreage. They would then convey to whomever you direct.
>
> "I am writing this in the absence of Mr. Thiele, inquiring whether you would be willing to give them your deed upon their written agreement to make conveyance and you could

prepare the deed direct to the Wisconsin River Power Company or I could have it prepared here and submit the abstract for examination and have them prepare the agreement or you could prepare the agreement in such manner and form as you think best. I do not have the correspondence before me that has passed between us on this subject but it is someplace in my files but not so-placed that we are able to locate it and it may have to wait until I return to the office.

"I have in mind at this particular moment a conveyance to either the West one-half of the Northwest or the East one-half of the Northwest of Section16, Township 19, Range 4, either of which would contain a trifle over forty acres of up-land after the South part of either of the parcels was flooded and their reservations were made.

"Will you let me know what you think of the foregoing at once!"

Loehde answered under date of March 13, 1948:

"Before Mr. Thiele left for Sandersville, Georgia, he tried to reach me during my sojourn in Colorado. Was lucky to speak to him over long distance phone shortly before he departed. The sum total of the conversation was as follows:

> 'Mr. C. C. Fuller of Necedah, Wisconsin, is in complete charge of the program. Should an emergency arise relative to use, the company is at liberty to act on necessary construction work and we will agree on settlement later.'

"This met with his approval and he expressed a desire to join you and I in a joint cooperative program with reference thereto, with a conveyance to the three of us of a property that the company had no use for and which we could adjust between us and which would have speculative value

and would be fair value today for the forty acres they need on the river below the power dam at Necedah.

"Now, Mr. Fuller how would it be if you postponed the program until Mr. Thiele returns and the three of us can get together.

"To expedite matters please have a deed prepared to the company and mailed to me which I shall sign and deliver to you together with the abstract all to the end that you can hold the same in escrow until we get together and agree on a deal, next 90 days.

"Mr. Thiele expressed some concern about emergency matters of minor importance relative to the forty acres in respect to which I assured him he could move and you would be in charge and protect my interest. This met with his approval.

"Now Mr. Fuller, I am writing you this lengthy letter with the expressed purpose of keeping you in touch with what developed since we last met at Necedah. It appears that the company has a definite purpose for the Loehde forty acres and my purpose is to cooperate through you to the end that you acquire the same for the company at fair value. I wonder if fishing rights and any use not interfering with the company's operations in the dam deal could be reserved by me in the proposed deal as I have a desire to capitalize the advantages of the drop in water level and non corporate use of the property.

"I wish to congratulate you on your recovery and hope that you will capitalize the same by taking care of yourself."

It is evident from Loehde's letter that his understanding of his conversation with Thiele, defendant's president, was that Thiele, Fuller and he were to be the grantees in a conveyance from the defendant of land having "speculative value" but of "fair value today" for plaintiffs' property. He does not accept the proposal

tendered by Fuller's letter but requests that the matter be postponed until Thiele's return "and the three of us can get together." He does suggest that to expedite matters that a deed be prepared to the Company to be held in escrow "until we can get together and agree on a deal, next 90 days." He inquires if "fishing rights and any use not interfering with the company's operations" could be reserved in the deed of plaintiffs' land to the defendant. Fuller, who was confined to his home following illness, replied through the cashier of the bank of which Fuller was President, under date of March 17, 1948, that a deed to the defendant was being prepared and requested that the abstract to the property be forwarded. On March 19, 1948 Loehde forwarded the abstract and under date of April 1, 1948 the bank cashier forwarded to Loehde an unsigned warranty deed dated April 2, 1948 naming William H. Loehde and Jessie Carolyn Loehde, his wife, as grantors and Wisconsin River Power Company, as grantee, and conveying the Loehde property without reservation, exception or condition. The letter of transmittal advised:

> "Mr. Fuller asked me to send the enclosed deed to you for execution. The abstract has been continued to date and is now being examined. Mr. Fuller asks that you return the deed to this bank and he will work out some deal along the lines you wrote him, that will be mutually satisfactory."

Plaintiffs did not execute or return this deed, but on April 12, 1948 William H. Loehde forwarded to the bank cashier a deed executed by plaintiffs and dated April 10, 1948 to be held in escrow, stating that "The consideration therefore shall be arranged between the Company and me within the next ninety days upon Mr. Fuller's recovery." The April 10, 1948 deed was drafted by Loehde and was described by him at the trial as a "seepage deed." It contained exceptions and conditions which caused defendant's title examiner to return it to the bank cashier with the following comment:

> "We are returning herewith the deed to Wisconsin River

Power Company executed by William H. Loehde and wife covering Government Lot 1, Section 10, Township 18 North, Range 4 East. This deed is so complex and obscure that we are unable to get at the meaning of the same.

"Our people understood that they were to get a deed of the premises, and we are enclosing herewith a deed which we would like to have executed. If he wants to buy the property back later some time or take it back after we are through with it then we can make some arrangement to that effect. Our people tell us that the property will be worthless when they have used it for filling and a sand pit.

"We would not like to take the deed as it is worded as we see no necessity for such complication. You may have to hold it until Mr. Fuller is well enough to take the matter up with Mr. Loehde."

Subsequent to April 10, 1948 defendant entered upon the property and excavated and removed the same. In September 28, 1948 defendant leased all fur rights and rights of trapping on the tract, and other lands, to Walter Buchanan for a twenty-five year period. Fuller again wrote Loehde October 11, 1948 forwarding another warranty deed and requesting its execution; the deed "to be held until further development." Again on October 19, 1948 Fuller wrote Loehde about the execution of the deed inquiring if he "would be more interested in a cash settlement" and the amount of such cash consideration.

It is apparent that the correspondence above detailed did not establish a contract on the part of plaintiffs to convey the tract they owned to defendant. We reach this conclusion apart from any consideration of the question of William H. Loehde's authority to act for or to bind his wife, a co-owner of the property, or whether he purported to do so. Nor did the escrow deposit of the April 10, 1948 deed executed by plaintiffs effect a conveyance of title to defendant. The consideration therefore was never "arranged," or agreed upon; the transaction never

consummated. In addition the defendant affirmatively rejected acceptance of a conveyance on the terms and conditions contained in that deed. Although Loehde's correspondence indicated a willingness to deal, no deal was ever agreed upon or concluded.

We find no support in the present record for the findings, conclusion and judgment of the District Court vesting title to the property in defendant. The case must be reversed and remanded for a new trial. We therefore do not consider defendant's contention that this Court would have authority to correct the second paragraph of the judgment by amending it to award the $760.00 to both plaintiffs instead of to William H. Loehde alone. In view of the disposition we make of the appeal we do not deem it necessary that we consider other issues raised by plaintiffs' contentions. We do direct that the District Court permit such amendments to the pleadings as will serve to properly reform the issues and that it permit plaintiffs to introduce evidence as to the value of the sand excavated.

REVERSED AND REMANDED FOR A NEW TRIAL, WITH DIRECTIONS.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

7TH CIRCUIT COURT OF APPEALS DECISION, JUNE 12, 1962 – 304 F. (2d) 433 – No. 13650.

Before HASTINGS, *Chief Judge*, and DUFFY and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge.* This diversity action originated in a suit brought in the District Court by plaintiffs-appellants, William H. Loehde and Jessie Carolyn Loehde, against the defendants-appellees, Wisconsin River Power Company (hereinafter referred to as defendant) and Walter Buchanan, its lessee, to recover possession of a forty acre tract of land and to recover damages for materials excavated therefrom and for inundation thereof.

The tract in question is near Necedah, Adams County, Wisconsin, adjacent to, and about 500 feet below, the Petenwell dam erected by defendant in 1948. William H. Loehde is the owner of the tract.[1] He acquired it some years before the erection of the dam. Approximately 320,000 cubic yards of soil were excavated from the tract and used in construction work incident to the erection of the dam. Prior to the excavation about thirty acres of the tract were above water. As the result of the excavation and the completion of defendant's project all but about three acres are under water.

A judgment that defendant is and was from April 10, 1948 the owner in fee simple of the tract, free and clear of all claim, right or demand of plaintiffs, and that William H. Loehde is entitled to have and recover of defendant $760.00, with costs, was reversed by this Court in *Loehde v. Wisconsin River Power Company*, 7 Cir., 277 F. 2d 656. We held that the record failed

1. Jessie Carolyn Loehde is but a nominal party. As wife of William H. Loede she possesses an inchoate right of dower in the tract. The record in the earlier appeal indicated she was co-owner but the ownership has been clarified by subsequent amendment.

to establish a contract for the conveyance of the tract to the defendant. We pointed out (p. 660) that although the correspondence relied upon by the defendant as constituting a contract upon the part of the plaintiffs to convey the tract in exchange for forty acres of defendant's property to be selected by plaintiffs indicated a willingness to deal no consideration was ever agreed upon. We remanded for a new trial and directed that such amendments be permitted as would serve to properly reform the issues and that plaintiffs be permitted to introduce evidence as to the value of the sand excavated from the tract.

Plaintiffs amended the complaint to increase the *ad damnum* to $160,000.00, to aver ownership of the tract in William H. Loehde, and by adding a count seeking injunctive relief permanently restraining the defendant from continuing to cause water to percolate through, or flow on or across the tract.

The retrial of the cause culminated in a judgment awarding plaintiffs $260.00 in damages, adjudicating plaintiffs to be the owners of the tract, directing the defendant to return possession thereof to plaintiffs, and enjoining the defendant from permitting percolating waters from the dam to flow across the tract to such an extent that it causes further erosion to said land.

Plaintiffs' appeal excludes from its scope those portions of the judgment order adjudicating ownership of the tract and directing return of its possession to plaintiffs. And, the appeal precipitates the issues (1) whether the court erred in applying as the measure of damages the difference in the value of the property before and after the excavation and resulting inundation, and (2) whether the court erred in restricting the injunctive relief to a restraint against causing a further erosion of the land by percolating waters.

The plaintiffs contend that defendant's entry upon the land and excavation of soil therefrom was a willful trespass and that plaintiffs are entitled to recover as damages not only the value of the soil in place but its enhanced value as conveyed to the dam

site and incorporated in the dam, and that in addition to such damages plaintiffs are entitled, as owners of the premises, to an injunction restraining the defendant from continuing to cause water to percolate through and flow over the tract and to require defendant to remove all of the water it has caused to be on the tract.

The District Court's judgment order is premised upon findings and conclusions, among others, that the Loehde tract was, prior to construction of the dam, unsuitable for farming, timber growing, grazing or other economic purposes; that the tract was scrub land, low, semi-swampy and subject to frequent flooding by the Wisconsin river; that the removal of the 320,000 cubic yards of material caused all but approximately 3 acres of the tract to be inundated to a depth of 8 to 10 feet; that the excavation was done by the defendant in good faith as a licensee with the consent of William H. Loehde; that the value of the tract prior to construction of the dam was $760.00 and its value subsequent to construction is $500.00; that there was sufficient other soil in the general locale, at no greater hauling distance, defendant could have utilized in constructing the dam in lieu of plaintiffs' tract; that no competent evidence was introduced establishing the value of the soil removed from plaintiffs' tract; that seepage and percolation from the dam threaten to further erode the Loehde tract; and that the Buchanan lease is void.

The correspondence which, together with the coexisting facts, we found on the first appeal to evidence a "willingness to deal" but not a contract to convey is set forth verbatim in *Loehde v. Wisconsin River Power Company*, 7 Cir., 277 F. 2d 656 at pages 658 to 660. We deem it unnecessary that we set it out again. Our review of the present record, which contains the same exhibits, convinces us that the District Court did not err in its findings and conclusions that the use made by the defendant of the Loehde tract in the construction of the dam was with the consent of William H. Loehde. Loehde's letter of March 13, 1948 evidences his awareness that "the company [defendant] has a defi-

nite purpose for the Loehde forty acres" in the construction of the dam and that it was his purpose "to cooperate through you [Fuller, an intimate friend of Loehde's, who as an officer of defendant was acting for it in the acquisition of land in connection with the construction of the dam] to the end that you acquire the same for the company at fair value". That Loehde was aware that the contemplated use of the tract would cause its inundation is reasonably inferable from his inquiry in the letter "if fishing rights and any use not interfering with the company's operation in the dam deal could be reserved by me" and by his subsequent forwarding on April 12, 1948 of an instrument he described as a "seepage deed" for deposit in escrow. In the March 13, 1948 letter Loehde advised:

> "Should an emergency arise relative to use, the company is at liberty to act on necessary construction work and we will agree on settlement later."

We are of the opinion that the District Court's findings and conclusions that the excavation and resulting inundation was done by the defendant in good faith as a licensee with consent of Loehde find substantial support in the record and consequently we are precluded from disturbing them on review. Rule 52(a), Federal Rules of Civil Procedure (28 U.S.C.A.).

Plaintiffs introduced no evidence as to the value of the tract before and its value after the excavation and resulting partial inundation. The court's findings in this respect are supported by the testimony of defendant's witnesses. And, that the excavation and resulting inundation would not produce detriment only is inferable from Loehde's prognostication, expressed in 1948, of his desire to capitalize on the "advantages" to result from the anticipated use of the tract in connection with the construction of the dam.

A highway and earth moving contractor who had done road construction in the general area, testifying as an expert witness for the plaintiffs, stated that in his opinion the value of the ma-

terial *in situ* before its removal from the Loehde tract was 15 cents per cubic yard.[2] His opinion was based on the assumption that there was no other suitable material available, of comparable location and length of haul, for use in constructing the earth dam. He was the only witness who testified as to an *in situ* value of the material excavated. The court's finding and conclusion that there was no competent evidence to establish the value of the soil removed from the tract is premised on the court's resolution of conflicting testimony as to the availability of other suitable borrow at a comparable expense of haul. From our examination of the record we cannot say the court's finding is clearly erroneous and it is not our function as a court of review to weigh the evidence. *Witson v. Aurora Iron & Metal Co.*, 7 Cir., 297 F. 2d 106, 109.

In *Herbert A. Nieman & Co. v. Holton & Hunkel Greenhouse Co.*, 248 Wis. 324, 21 N.W. 2d 637, it was held that damages could not be limited to the value of soil removed from land where the damage to the land itself exceeded the value of the soil removed. But no case has been called to our attention, nor are we aware of any, where the removal was with the owner's consent or permission, which holds that the recovery therefor may exceed the value of the entire property. But if it be assumed (and we make no express holding) that the plaintiffs are not limited in their recovery of value of the material removed to the value of the tract itself, nevertheless, the trial court's finding that the value of the material removed was not established is, on the record before us, binding on review.

In *Zombrowski v. Wisconsin River Power Company*, 267 Wis. 77, 64 N.W. 2d 236 the difference between the value of the land before and the value afterwards was held to be a proper measure of damages for the partial inundation of property by percolating waters, seepage from a reservoir created by a dam.

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2. Other evidence established that 30 cents per cubic yard was paid to the construction contractor for excavating the material, conveying it to the dam site, and incorporating it in the structure.

In *Blumer v. Wisconsin River Power Company*, 6 Wis. 2d 138, 94 N.W. 2d 149, the same criteria was approved to measure damages due to the raising of the water table through operation of a dam. We are of the opinion that on the record in the instant case it was not error for the trial court to apply that criteria as the measure of plaintiffs' recovery.

And, equitable principles do not, on the facts and circumstances here involved, entitle plaintiffs to greater or broader injunctive relief than that awarded. The use of the tract was found to have been consented to and the resulting inundation was a natural result of the excavation and the construction of the earthen dam, which if not actually foreseen, is in any event the subject of compensation in the monetary award of damages. Plaintiffs are entitled only to protection from acts of the defendant which would cast a further or greater burden on the tract involved -- not to restoration of the tract to its condition prior to its use for borrow for construction of the dam.

Under the peculiar circumstances reflected by the record before us it is our considered judgment that the District Court in its disposition of the case has accomplished substantial justice.

The judgment order of the District Court is therefore affirmed.

AFFIRMED.

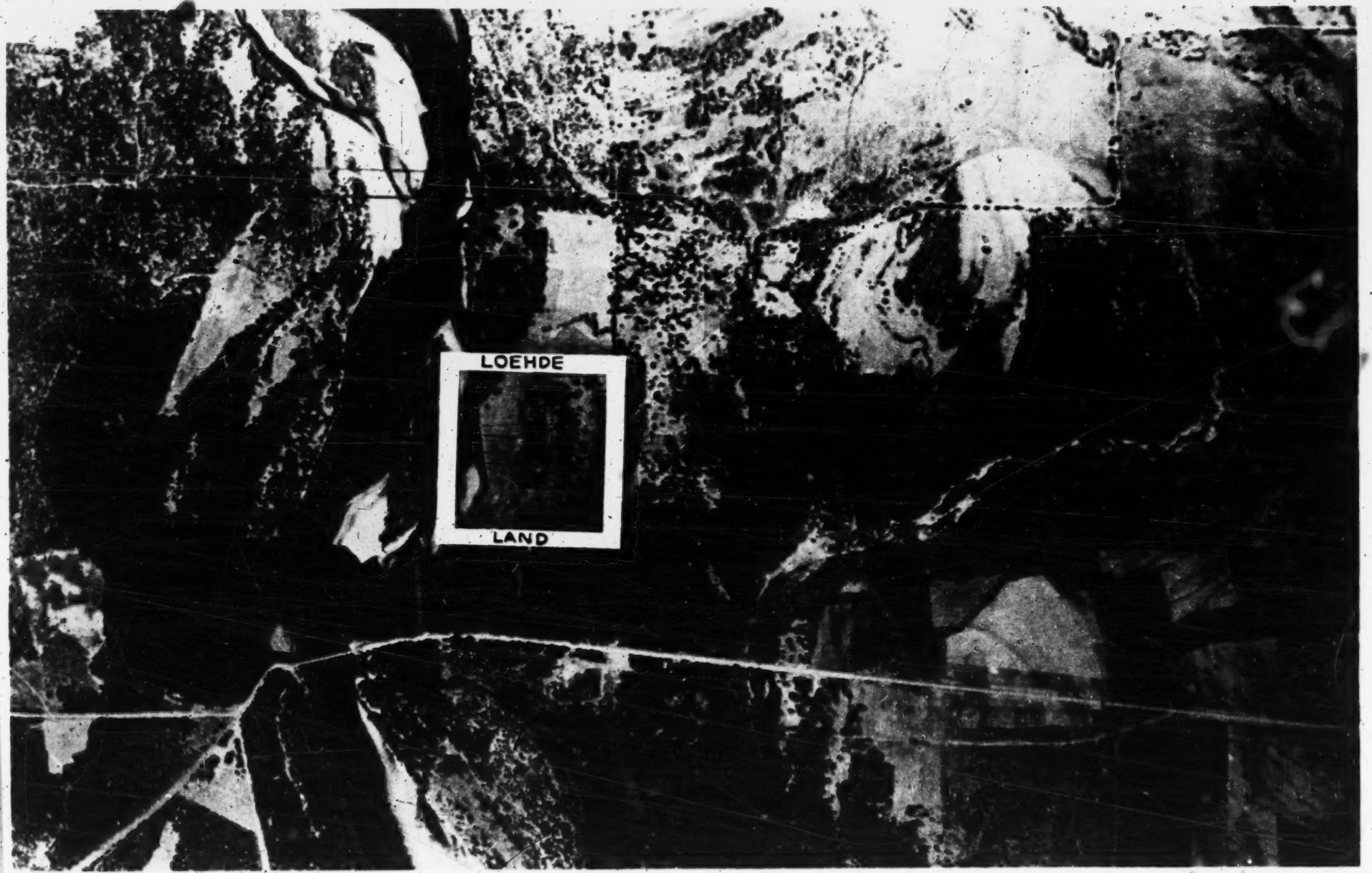
A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

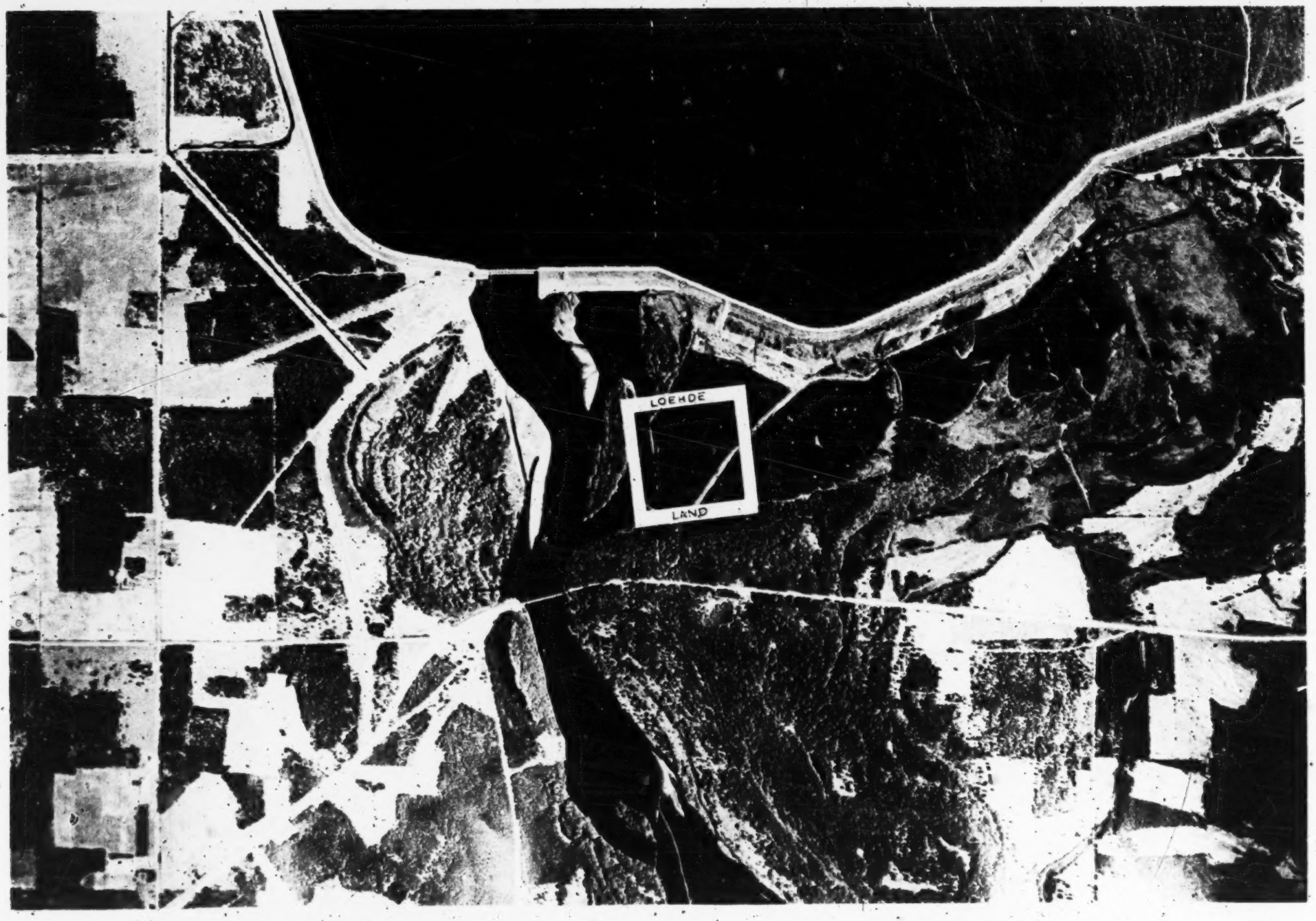
APPENDIX C

Exhibit 22 -- Petenwell Dam Area and Loehde Land *Before Construction.*



APPENDIX D

Exhibit 23 -- Petenwell Dam, Area And Loehde Land (Lake) *After* Construction Completed.



APPENDIX E

Exhibits 29 and 30 -- Petenwell Dam Area, With Overlay Data By Power Company Engineer Showing Numbered Borrow Pit Areas, Drainage Ditches, Land Ownership, Etc. (Scale of 8" = 1 mile does not apply to this condensed reproduction of the exhibit.)